Isle of Man Government

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DEPARTMENT OF HOME AFFAIRS

Consultation on the principle of legislation to implement the Criminal Justice Strategy

SUMMARY OF RESPONSES TO THE CONSULTATION

January 2017

1. Publishing the Consultation

1.1. The Department published the consultation on 11th July 2016.

1.2. The consultation document, in line with the Isle of Man Government's Code of Practice on Consultation, was sent directly to various persons or organisations, including the following–

- Tynwald Members
- Acting Attorney General
- Clerk of Tynwald
- Chief Officers of Government Departments, Offices and Statutory Boards
- Social Affairs Policy Review Committee of Tynwald
- Local Authorities
- Chamber of Commerce
- Isle of Man Employers Federation
- Isle of Man Law Society
- Isle of Man Constabulary
- Isle of Man Police Federation
- the Police Advisory Group
- the Police Consultative Forum
- Victim Support
- Safe, Strong, Secure
- Isle of Man Trades Council
- Positive Action Group
- Mec Vannin
- Liberal Vannin

1.3. A press release was issued and details of the consultation were widely publicised in the media. This document was also published on the Isle of Man Government's consultation website.

2. Submission of responses to the consultation

2.1. The Department received 18 responses, of which -

- 7 were from individuals;
- 3 were from Local Authorities;
- 5 were from Government/public sector bodies; and
- 3 were from other organisations involved in criminal justice matters;

3. Summary of responses to the Consultation questions

3.1. In broad terms most of the persons or bodies who responded to the consultation were supportive of the proposals and the Department is grateful for the helpful points made.

One or two individuals commented from direct personal experience of the criminal justice system as victims, or relatives of victims. One respondent, whilst not supportive of most of the proposals, provided some constructive feedback on a few of the proposals, which the Department has borne in mind in considering how to develop the proposed legislation.

3.2. Through the consultation document the Department invited responses to 11 questions and this summary sets out each question together with a summary of the points made in response.

3.3. "**QUESTION 1:**

Extract 1 (page 24) contains details of the five requirements and the code of practice it is proposed to place within a Bill. These are in early draft form and your views on those provisions and the principle of the cautions proposals as a whole would be welcome."

Most respondents were supportive of the principle of placing cautions on a statutory basis and providing the additional ability to place conditions on some cautions. The Department acknowledges the issues raised by one respondent. In particular, the Department recognises cautions must not be seen as an easy option. Failure to abide by the conditions of a caution should not only render the person liable to prosecution for the original offence but the failure to comply with the caution should be relevant to the prosecution.

Department response

The Department remains firmly of the view that cautions, whether administered with or without conditions, are key components of an effective strategy to address and divert offending at an early a stage as possible. The Department considers its duty to prepare a code of practice about the use of caution should at the very least go some way towards addressing issues raised by one of the respondents.

"**QUESTION 2:**

A– In Extract 2, are there any other provisions that need to be amended so the age is changed from 17 to 18?

B – Are there any unintended consequences likely to arise from this apparently simple change of age?"

Most respondents supported the proposed change so that 17 year olds would be dealt with in the juvenile court rather than the adult courts. No unintended consequences were anticipated. The Bill will need to contain transitional provisions to address those cases where a 17 year old's case is being proceeded with at the time the Act comes into operation. One respondent disagreed with the proposed change of age and commented that persons aged 16 years or over are eligible to vote so should also be treated as adults in terms of justice.

Department response

The change in age is a matter of complying with human rights and an international Convention on rights of children and, accordingly, must be progressed.

"**QUESTION 3:**

The aim is to empower the various agencies and to remove potential legal obstacles to working together to support youth justice. Do you think placing a legal duty on agencies to work together is the right way to address this? If not, what is your preferred method of ensuring agencies work together to secure justice in respect of young offenders?"

This proposal was universally supported though one respondent wondered what sanctions would apply if, despite the provision, one or more of the various agencies declined to work with the other agencies. In passing, one of the respondents suggested consideration should be given to raising the remit of youth justice to consider cases up to the age of 24. Perhaps the way to address this is to have similar multi-agency working for persons aged 18 years and over. *Department response*

The Department's view is that legislative provision is about removing impediments to the participation of all parties and their confidence in sharing such information and resources as are necessary to support youth justice. Legislation will be developed to place a legal obligation on agencies to work together. Increasing the upper age limit is already being considered as part of the criminal justice strategy.

"**QUESTION 4:**

Do you agree the Youth Justice Team should be placed on a statutory basis? If you do not agree, please say why and outline your alternative provision for youth justice."

Whilst one respondent did not consider it necessary to place the work of the Youth Justice Team on a statutory basis there was broad support from other respondents.

Department response

The Department considers that placing the work on a statutory basis will assist in multi-agency working and will progress legislation accordingly.

"**QUESTION 5:**

Do you have any comments on the proposed legislative changes?"

There was broad support for placing the management of offenders on a modern statutory basis. One respondent was concerned the work of the probation service should not be privatised. Another respondent supported the proposals but wondered if the Department would be able to recruit persons to carry out the probation function as he did not think it was a career choice favoured by many these days. Other respondents wondered if it was appropriate to give probation officers the role of keeping victims informed and questioned the proposal relating to giving probation officers a role in the giving of conditional cautions.

Department response

The work probation staff undertake has developed over the years and the Department considers it presents more opportunities and exciting challenges that will appeal to

individuals looking for a career, or indeed a change of career. In developing the proposals in legislative terms the Department will consider further the functions it is or is not appropriate to empower or require probation staff to perform.

"**QUESTION 6:**

Do you consider the removal of this restriction to be a positive move? If not, why not?"

Respondents were supportive of the proposals. One respondent suggested that given the variety of options available to a court, other than sentencing a person to a term of custody, perhaps provision should be made to enable the court to make a "community order" and have it tailored to meet the circumstances of the particular case. The same respondent also indicated support for removing the current restriction on suspended sentence supervision orders so that they may be imposed on orders of less than 3 months duration (they currently apply only to those in excess of 3 months). Respondents were supportive of proposals to enable reparation and other orders to be made in combination with each other and/or with a custodial sentence.

Department response

The Department will see if it is possible to tidy up the statute book so it is possible for the court, where it determines to hand down a non-custodial sentence (irrespective of whether it includes a fine or a compensation order), to make a "community order" and tailor that order so it may include a number of elements (for example those such as a probation order or a community service or a reparation or a mediation order). The Department will also look to remove other restrictions and enable a greater variety or combination of sentencing options to be exercised.

"QUESTION 7:

Do you agree with the proposal (and if not, what alternative proposal would you like to see explored).

i. to increase the maximum number of hours a person may be required to undertake in reparation;

ii. to increase the maximum number of hours to 240 hours; and/or

iii. to provide that the order for reparation may specify a particular outcome that must be achieved (which means the person must work however many hours are necessary – whether many or few)?"

Respondents generally welcomed both the principle of reparation and the suggestion that the maximum number of hours that may be worked in relation to reparation should be increased. There was no consensus about what the revised maximum number of hours should be. One respondent emphasised that it was important not to place the victim in a position whereby the reparation made is long drawn out. Reparation orders should be flexible. Another respondent stated it was important that the person undertaking reparation does so to a high quality. A further response was that the current maximum of 24 hours is sufficient if performed quickly and in any event within three months of the order being made.

Department response

The Department does consider the current maximum of 24 hours to be insufficient as there will be some cases where reparation that makes good the wrong done to a person or to society will take more than 24 hours of activity to be fully effective. The Department is minded to increase the maximum number of hours to 100 and will consider this matter further as the Bill is developed.

"QUESTION 8:

In respect of anti-social behaviour sentences, do you agree the court should be able to make an order in respect of a person or persons of the same household (i.e. in the domestic setting)? If not, please explain why and perhaps suggest an alternative option for dealing with anti-social behaviour by a person, or persons, in the same household."

Many respondents recognised the reasons behind the question and whilst it is important to tackle anti-social behaviour within the domestic setting as well as further afield they advised caution, or expressed doubts about tackling such behaviour in the manner suggested. Two respondents suggested a better way to achieve the objective would be to adopt UK provisions that specifically address unacceptable behaviour in the domestic setting.

Department response

The Department appreciated the variety of views expressed. Whilst, in context, the proposal was to address anti-social behaviour in the domestic setting, in practice such behaviour amounts to domestic abuse. In the light of comments from one respondent the Department will consider adapting sections 24 to 31 of the Crime and Security Act 2010 (of Parliament) and making the breach of a Domestic Violence Protection Notice/Order a criminal offence. These provisions empower the Police to act immediately if there is anti-social/abusive behaviour being exhibited in the domestic setting. Once the immediate situation has been dealt with the provisions would set out a procedure to enable the situation to be addressed over a longer period of time.

"QUESTION 9:

The Department would appreciate your views on deferred sentencing, the conversion of short custodial sentences to community sentences and the idea that offenders may serve their time in custody on an intermittent basis as briefly outlined above."

In relation to the idea of developing legislative provision for deferred sentencing some respondents felt this could be useful where the offender was sincere and remorseful or else for giving such persons an opportunity to demonstrate their sincerity before sentence is passed/confirmed. One of the respondents was more enthusiastic as he felt it offered a real incentive to the genuine to reform.

The Department received a few responses to the proposal to convert short custodial sentences to a community penalty. One respondent felt that where a custodial sentence is imposed it should not be converted to a community penalty because the public need to know that persons sentenced to custody are actually serving time in custody. Another

respondent felt that the courts should not have their sentencing powers placed in legislative straightjackets and sentencing ought to be left to the discretion of the courts for whom "Sentencing is an art rather than a science". From another perspective a respondent considered that the conversion of a short custodial sentence to a community penalty would have the benefit of enabling the offender to maintain their accommodation and employment.

There were a number of responses to the proposal for intermittent (or "weekend") custody. A few were supportive and could see its potential, in some cases, to enable some to be punished but at the same time maintain their job, accommodation and family life with the advantage that, with the right support, reintegration back into normal society may be easier to achieve. Whilst noting this proposal would increase the sentencing options open to a court others pointed to the failure of a pilot in the UK and the observation that it could be unsettling for the offender and indeed hinder that person's rehabilitation. An argument was made that intermittent custody flies in the face of the principle that offenders, once sentenced to custody, should serve their sentence and then be released. If the Department determined to press ahead with the proposal it should provide for those supervising the intermittent custody arrangements to return the offender to court if the circumstances that made the sentence an appropriate option no longer apply (such as child care arrangements changing or employment/accommodation falling through). One respondent, whilst supportive in principle, could see practical issues that would have to be overcome such as the process for booking in and booking out prisoners each week, the need to enhance security to prevent illicit articles being trafficked in and out of the Prison and any remedial action where a prisoner fails to return to custody at the appointed time.

Department response

The Department considers that specific provision to enable a sentence to be deferred, as distinct from being suspended, would be a useful addition to the Manx statute book in pursuance of the criminal justice strategy. The Department will therefore explore this matter further with a view to including enabling legislation in the forthcoming Bill.

There were few responses to the proposal relating to converting short custodial sentences to a community penalty. Having considered the responses, and taken account of the many other proposals that will advance the criminal justice strategy, the Department has determined not to progress this proposal at the present time. Whilst research from Finland[1] suggested the proposal worked well in that country and some suggest some prisoners may prefer short sentences to community service because the former is easier[2] the Department is also aware of research that suggests a more mixed picture in the Republic of Ireland[3]. In the event further evidence comes to light that shows this proposal may work if applied in the Isle of Man the Department will review the matter at a later date.

The proposal to provide for intermittent (or "weekend") custody will not be progressed by the Department. Whilst there are a number of positive aspects to the proposal, the Department recognises there are some practical issues that would need to be resolved and experience or evidence from the UK pilot suggests the advantages are outweighed by the disadvantages. In particular the UK experience suggested intermittent custody could in fact be unsettling for the prisoner and serve to hinder, rather than enhance, rehabilitation.

[1]An article on Finnish sentencing policy was studied entitled "Imprisonment and Penal Policy in Finland" was published by or under Scandinavian Studies in law, 1999-2012.
[2]https://www.theguardian.com/society/2011/jun/08/prisoners-prefer-jail-sentence-to-community-service
[3]http://arrow.dit.ie/cgi/viewcontent.cgi?article=1069&context=aaschsslarts

"QUESTION 10:

The Department would be interested to receive your views on whether or not there is merit in providing for a Sentencing Council for the Isle of Man."

Respondents also commented on the proposal to increase the sentencing powers of the High Bailiff. There was a general view amongst those who responded that increasing the sentencing powers of the High Bailiff was a reasonable proposal that should be progressed. One of the respondents indicated the sentencing powers should be increased to 2 years with the power to hand down an unlimited fine. This would inevitably increase work in the Summary Courts and, by implication, lead to a decrease in the work in the Court of General Gaol Delivery. However, it would have the overall effect of reducing the costs on the basis that fewer cases will have to be prepared for the General Gaol setting. General Gaol would continue to deal with the more serious cases where the likely sentence would exceed 2 years custody.

There were a number of respondents who supported the establishment of a Sentencing Council. Two respondents felt this proposal would enhance open justice and transparency whereas another respondent was vehemently against the proposal on the grounds there are already established guidelines and precedents followed by the sentencing courts. A member of the public who responded felt that a Sentencing Council would be good because it would standardise sentences. Other respondents were concerned to ensure that if the Council was to be established the membership would be appropriate and inclusive.

Department response

There is clear support for increasing the sentencing powers of the High Bailiff and the Department will progress the legislation to give effect to this matter.

The matter of establishing a Council to set out sentencing guidelines, it is conceded, is more complex and, in a certain quarter, potentially contentious. The Department is unconvinced, despite the submission of one respondent to the consultation, that there is sufficient sentencing and related guidelines or information in the public domain, which is also easily accessible to meet the modern requirements of openness and transparency. However, the Department considers there are other more advantageous improvements to criminal justice legislation outlined in this consultation that may be progressed at this time. The Department will keep the matter of sentencing guidelines and related information useful to the public under review.

"QUESTION 11:

The Department would be interested in your views –

i. on the principle of using alternative means to give evidence including visual recording, early cross-examination etc; and

ii. on the proposed New Zealand model as adapted for the Island."

The consultation document addressed two matters. The first concerned the information provided to offenders and other parties upon the passing of a non-custodial sentence and the second related to alternative means of giving evidence.

One respondent stated that information about a non-custodial order is already given. It was submitted that details of a non-custodial sentence are explained to the offender during sentencing and information in the order is provided to the probation officer. It was also, however, conceded that nothing is given to the offender in writing to confirm what his or her penalty is.

In respect of the concept of alternative ways of giving evidence there was support from all consultees except one. Those who supported the introduction of the New Zealand model enabling alternative means of evidence saw it as a much more comprehensive overhaul, long overdue, of current provision which is inadequate. Consultees, other than the one opposing respondent, considered it would be really good to take evidence as early as possible, to help vulnerable people and to prevent intimidation of witnesses. Another respondent further contended that this would enable vulnerable witnesses to access therapy and begin their recovery much earlier than is the case now. Indeed the proposals could assist vulnerable witnesses including those who are vulnerable for a variety of reasons and not just being below a certain age.

An individual respondent submitted that current delays in getting cases to court make alternative means of giving evidence essential (it would of course be better if cases got to court sooner). Another respondent indicated the proposals accord with achieving best evidence guidelines as applied in the UK. It was further observed that the UK Courts bend over backwards to assist witnesses so that they are comfortable and when they do give their evidence it accords with their wishes so they can give the best evidence possible. This contrasts with the Isle of Man where, the respondent observed, the presumption appears to be against special measures (rather than in favour). In contrast, the opposing view, put at length by a respondent, was that whilst the pre-recording of evidence, including cross-examination, was theoretically attractive; it would fail given the need for a fair trial and the respondent asserted these failures lie with one party alone. The respondent denied the need for any change or development of existing provision in respect of child complainants in particular. The respondent then indicated constructive measures to make it easier for vulnerable witnesses to give evidence, consistent with a fair trial, would be supported. However, the respondent then stated that a system that enables cross-examination being partially recorded and partially live in court whether via live link or otherwise would be resisted.

Department response

If it is averred that the courts already inform persons of its orders then it should also follow that the proposals the Department put forward, based as they were on a model found in New Zealand, should not be too difficult to comply with as they represent a modernisation and development on existing procedure. It does not seem unreasonable to the Department, and indeed consultees, that an offender should be provided with details of the order affecting them as soon as possible. In the light of the Government's Digital Strategy the Department considers it must be possible to ensure that court orders can be provided to the offender and electronic copies being sent to relevant parties and agencies at the same time. The proposal will be developed and included in the forthcoming Bill.

The Department notes the opposition of one respondent to the fresh (but not, in the wider world, novel) proposal to make new provision for evidence to be given by witnesses, and to enable that evidence, in certain cases, to be given at an earlier stage in proceedings in or leading up to a trial. The Department also has had regard for the views of that respondent and has considered those views. It has noted that other respondents, both individuals, bodies and parties within the criminal justice system, for their part, support the proposals both in principle and in detail. The Department is firmly

of the view these proposals to provide in more detail for alternative ways of giving evidence are realistic, modern, and will help victims and witnesses give evidence in the most comfortable and appropriate manner. The proposals will be progressed as outlined in the consultation document accordingly.

"FURTHER ISSUES

The Department would be grateful for your views on the following issues -

- *To clarify what a sentence to a term of custody means (i.e. how long will a person actually spend in Prison/Secure Care (Cronk Sollysh)?).*

1. *should a term of custody be in real time (i.e. the term handed down by the court is the minimum actual time served in Prison)? or*
2. *should a person sentenced to a term of custody be entitled to apply for early release on parole at the halfway point of their sentence?*

   The advantage of this is that everyone can know a person will spend a minimum of half their sentence in custody. The person will have an incentive to positively engage with the Prison, probation and other agencies during that period as the question of whether or not and when they are to be released will depend on the level of their co-operation whilst in prison custody.

3. *If option 2 above is preferred what conditions do you think will have to be satisfied before the person can be considered for release early?*
4. *do nothing (leave the system for early release as it is). The disadvantage of this option is that the law will continue to be confusing."*

There was almost universal support from consultees for the principle of much greater simplicity in respect of the period a person must spend in custody before they can be considered for early release on parole. All except one respondent[4], were agreed it was important to retain the power to release persons early as this could help on a number of fronts including behaviour and engagement with Prison and related personnel, which is important for rehabilitation and reformation of offenders. Equally, there was agreement there should be a common minimum period (whether after serving one third or one half) of a custodial term actually in custody. Respondents were also agreed that early release should not be automatic.

Various factors should be considered after the minimum period such as engagement with Prison authorities and other services as well as good behaviour. One respondent felt that release should be no earlier than at the half way point for all offences except violent offences where early release should not be before the two thirds point in the sentence. Another respondent submitted that parole should not be considered in cases of violence where the victim's injuries are life changing. Many consultees were agreed reform of Schedule 2 to the Custody Act 1995, which deals with the early release of prisoners, must be undertaken so it is clear as to its meaning.

[4]One respondent submitted that based on the severity of the crime the term of custody should be served in full.

Department response

The Department saw this issue as a discussion starter. In the light of the positive responses to the principle of clarifying how long a person sentenced to custody actually spends in prison the Department will review Schedule 2 (which may mean it must be repealed and replaced in the future).

4. Other matters raised by consultees

Other matters mentioned by respondents to the consultation include –

- making sure there is suitable legislative provision to enable the criminal justice process in courts to be undertaken electronically, thus saving paper;
- two respondents recounted their experience of the criminal justice system;
- one respondent submitted that provision along the lines of "three strikes and you're out" should be made as a deterrent and added that provision for forfeiture of remission by the prison authorities should be restored in order to better control prisoners.

Department response

The Department accepts the submission that legislation should be reviewed and changed where necessary to ensure there is no legal impediment to the progression of the Government's Digital Strategy as it relates to court processes. The Drafter in Chambers will be instructed accordingly.

The Department learnt of the experiences of two respondents in relation to the criminal justice system. It is accepted that the prosecution is principally responsible for ensuring that victims are kept informed and are involved in the justice process as it affects them. As legislation and other elements of the criminal justice strategy are pursued it will be critical for the success of the strategy that the concerns of victims are given greater weight by all parties, not least the courts themselves.

Whilst deterrence is an important factor in reducing the incidence of crime and re-offending in particular, the Department believes there are many other means by which deterrence may be effected other than a straightforward "three strikes and you're out" approach. The Department believes that the certainty a criminal will be caught, early intervention and effective and appropriate disposals or penalties are to be preferred.

5. Conclusion:

5.1. The Department is grateful for the responses received in relation to the 11 questions and the further issue relating to the period in a term of custody when a person may become eligible for parole. Having considered the responses the Department intends to develop the legislation and firm up a draft Bill with the following changes –

- question 7 – the maximum number of hours a person may be required to undertake in respect of reparation will be increased from 24 to 100 (in the consultation document 240 hours had been suggested);
- question 8 –instead of enabling anti-social behaviour orders to be made in respect of persons of the same household the Department will provide for the issue of Domestic Violence Protection Notices/Orders[5];

[5]Based on sections 24 to 31 of the UK Crime and Security Act 2010.

- question 9 – the Department will not progress proposals to convert short sentences to community service, or the idea of intermittent ("weekend") custody;
- question 10 – in order to progress legislation to implement aspects of the criminal justice strategy the Department will not, at this time, progress the proposal for a sentencing council or other means by which statutory sentencing guidelines may be issued;
- question 11 – a respondent advised the Department to ensure legislation empowers the Government's Digital Strategy to be implemented in respect of the courts. This is important and the Department will do so; in particular the Department will ensure the law enables the electronic submission of documents; and
- the Department will investigate further the issues surrounding the release of prisoners and the length of the term of custody a person actually serves in prison.

6. Outcome of the consultation

6.1. The Department will instruct the Drafter in the Attorney General's Chambers to firm up legislative provisions subject to the changes indicated in paragraph 5.1 and prepare a consultation copy of the Bill.

6.2. Once the Bill has been prepared the Department will consult on the Bill it proposes to introduce into the branches and invite comment once more. It is in the nature of criminal justice matters that they are underpinned by a considerable amount of legislation and this may therefore take a considerable period of time. Subject to any further changes arising from that consultation the Bill would then be introduced to the House of Keys.

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Department of Home Affairs

Isle of Man Government

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Copies of this document can be supplied in a large print format on request

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